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No. 87-1120

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

POUDRE VALLEY RURAL ELECTRIC ASSOCIATION, INC.,
a Colorado Corporation,
Appellant,

v.

THE CITY OF GREELEY, COLORADO,
a municipal corporation,
and HOME LIGHT AND POWER COMPANY,
a Colorado corporation,
Appellees.

On Appeal from the Supreme Court of the State of Colorado

BRIEF OF NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION, NATIONAL RURAL UTILITIES COOPERATIVE FINANCE CORPORATION, COLORADO RURAL ELECTRIC ASSOCIATION AND TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC., AS AMICI CURIAE IN SUPPORT OF THE APPELLANT

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INTERESTS OF THE AMICI CURIAE

The interests of the *amici curiae* in this appeal are, respectively as follows: [1]

[1] These interests are further articulated in the next portion of this Brief, entitled "Additional Information and Data Showing Interests of the Amici."

National Rural Electric Cooperative Association (NRECA) is a District of Columbia cooperative trade-service organization representing virtually all of the nearly 1,000 electric cooperative and public utility district borrowers of the United States Rural Electrification Administration (REA). These borrowers include the Appellant (Poudre Valley or Appellant) and its wholesale power supplier, Tri-State Generation and Transmission Association, Inc. (Tri-State), another *amicus curiae* in this appeal.

Rural electric distribution cooperatives such as Poudre Valley are responsible for electric service in 70-75% of the nation's total land area, including Alaska. Thus NRECA's interests—more importantly, the interests of NRECA's constituent member systems—are such as to compel a profound and sensitive concern for the outcome of this appeal.

* * * *

National Rural Utilities Cooperative Finance Corporation (CFC) is also a District of Columbia cooperative organization whose membership consists of 983 of the nation's electric cooperatives and their affiliated organizations. These include the Appellant and Tri-State, whose interest is set forth *infra* as well as all but one of the other 23 electric cooperatives domiciled in Colorado. CFC provides its members with debt capital, either solely, as in the case of financing pollution control bonds, or supplementally to funds borrowed by them from REA. CFC is a nonprofit cooperative.

* * * *

The *amicus* Colorado Rural Electric Association (CREA) is a Colorado corporation formed for the purpose of promoting the general welfare and interests of rural electric cooperatives in Colorado. It presently has 25 electric cooperative members, including all but four of such cooperatives domiciled or doing business in Colorado. (The Appellant is a CREA member.) The vast

majority of CREA's members hold certificates of public convenience and necessity issued to them by the Colorado Public Utilities Commission. These certificates authorize and obligate them to provide electric service on an exclusive basis within specifically defined territories in the state.

Rural electric cooperatives are obligated to serve approximately 75% of the land area of Colorado. Virtually all of these cooperatives are financed in whole or in part by REA and CFC. All but two of them obtain their wholesale power and energy either from Tri-State or Colorado-Ute Electric Association, Inc., a nonprofit cooperative.

* * * *

Tri-State is a nonprofit cooperative which supplies electricity at wholesale to its 25 members, all of which are electric cooperatives or public power districts located in Colorado, Nebrask or Wyoming. These members in turn serve residences, farms, ranches, small towns, businesses, industries, schools and churches. Of the 25 members, 11 are located in Wyoming, six in Nebraska and eight in Colorado. Combined, they deliver electricity to some 141,000 meters. Of those meters, approximately 84,000 are located in Colorado. (The Appellant is a Tri-State member.)

The members of Tri-State are obligated to serve an area of approximately 100,000 square miles, and over 90,000 square miles of this area have been certificated for such service by state regulatory commissions. The area served by these members is approximately the size of the six New England states plus the state of New York.

Tri-State is one of 57 generation and transmission cooperatives which supply electricity at wholesale in the United States. It is financed primarily through REA, the Federal Financing Bank (FFB), CFC and pollution control revenue bonds issued by Moffat County, Colorado,

and Platte County, Wyoming. Tri-State has facilities which cost some $800 million. Its members have total assets of some $500 million, of which approximately $256 million are located in Colorado.

ADDITIONAL INFORMATION AND DATA SHOWING THE INTERESTS OF THE *AMICI CURIAE*[2]

All of the *amici*—and all of their constituencies, which include virtually all existing entities financed by REA since its inception in 1936, *see* 7 U.S.C. Sections 901-950b (1980),—are directly or indirectly concerned with providing adequate, reliable electric service throughout operating areas in 46 of the 50 states, on a nonprofit basis and at the lowest cost consistent with sound business principles. They and and the federal government have worked closely together for over 50 years in a joint effort.

Consider certain relevant data[3] as of the end of 1986 for all REA borrowers:

—Long-term loans outstanding (multi-billions had already been paid off):

Source	Amount
REA	$19.4 billion
REA-Guaranteed	$31 billion
Non-REA Guaranteed	$ 7.7 billion[4]
TOTAL	$58.1 billion

[2] We urge the Court's particular attention to this section of our Brief. Not only does it set forth certain of the reasons underlying our profound concern for the outcome of this appeal; it also contains data which strongly buttress certain of our legal arguments, *infra*.

[3] These data are taken from 1986 Statistical Report, Rural Electric Borrowers, United States Department of Agriculture, Rural Electrification Administration, REA Bulletin Number 1-1. 1986 was the latest year for which these data were available when this Brief was prepared.

[4] Approximately $5.23 billion of this amount were provided by CFC.

—Total miles of electric line in place: 2,122,550
—Total consumers served: 11,357,105
—Average consumers per mile of line: 5.4

Consider, now, the same relevant data for Colorado as of the end of 1986:

—Long-term loans outstandoing (multi-billions had already been paid off):

Source	Amount
REA	$871 million
REA-Guaranteed	$ 1.42 billion
Non-REA Guaranteed	$317 million [5]
TOTAL	$ 2.6 billion

—Total miles of electric line in place: 59,339
—Total consumers served: 299,970
—Average consumers per mile of line: 5

The foregoing data emphasize three cardinal facts that bear on this appeal:

First, the United States has engaged in a national program of rural electrification by virtue of which, through direct and guaranteed loans, it, as well as others, primarily CFC, has invested—has loaned at considerable risk—an enormous amount of the nation's money. Impairment of the security of that investment is of paramount importance to both REA and its borrowers, whose credit is necessarily involved in any legal-operating context in which the income-producing potential of facilities thusly capitalized and markets thusly planned to be served are arbitrarily lost.

Second, impairment, if indeed not total loss, of such security—and of the related markets whose payments for service underpin such security—frustrate and obstruct the achievement of the national policy of rural electrification; at minimum, such impairment reduces, if it does not wholly destroy, the viability of the national rural electrification program.

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[5] Most of this amount was provided by CFC.

And third, the remnant populace which must "pick up the slack" and make good the loss suffered by such impairment is charged a punitive price.

Consider the relative poverty of operations already borne by Colorado's rural electric consumers: The largest electric cooperative (Intermountain) serves about 45,000 meters and has a density of about 7.23 consumers per mile of line, whereas the smallest one (White River) serves only about 2,300 and has a density of about 2.94 per mile of line.

* * * *

Tri-State has all-requirements contracts running through the year 2020 with all of its 25 members. Under the terms of these contracts, Tri-State is obligated to supply all of the power and energy requirements of its members. They in turn, are required to purchase all of their power and energy requirements from Tri-State.

To carry out this responsibility, Tri-State annually obtains from its members their load forecasts for the following 15-year period. These forecasts then are aggregated to determine the total amount of power and energy which Tri-State will require during those years.

Tri-State already has lost more than 50,000 kilowatts of load growth because of the loss of territory by its members in Colorado through annexation. Typically, municipalities annex high density developments with a relatively high number of consumers per mile of line. The more sparsely populated rural areas where load factors are typically lower are left, and consumers in these areas must pay not only for the more costly distribution system but also for the high fixed costs of unused capacity built to serve the loads lost to annexation. The estimated economic impact on Colorado's rural economy due to the loss of 50 MW of load is approximately $5 million per year. If Nebraska and Wyoming

loads are taken into account, the total impact is about $10 million per year.

If projected loads fall short of the forecast levels due to annexation, poor economic conditions, or other reasons, Tri-State will be required to increase its rates to its members and they, in turn, must increase rates to *their* consumer members. These increases, in turn, cause demand to decline, and the reduction in loads results in yet more rate increases since fixed costs have to be recovered from fewer units sold. This process, all too accurately, has been termed a "death spiral." Ever higher prices make it increasingly difficult for Tri-State's members to attract or retain industrial and commercial customers, which further accelerates the death spiral. The result of such spiral is unused generating capacity and increasingly higher electric rates to consumers in rural Colorado.

SUMMARY OF ARGUMENT

We simply adopt as our own the argument of the Appellant that it has not had its day in court.

The federal program of rural electrification, implemented pursuant to 7 U.S.C. Sections 901-950b (1980), must be recognized and respected by Colorado. That program is frustrated if REA borrowers, such as Poudre Valley and Tri-State, lose the benefits of promising markets developing in Poudre Valley's certificated service areas. The Federal Supremacy Clause, U.S. Const. art. VI cl. 2, requires that Colorado's Supreme Court be overruled for having so frustrated that program.

Greeley's ordinance requiring Pourde Valley to obtain a municipal franchise, as held by the Colorado Supreme Court, constitutes an unconstitutional impairment of Poudre Valley's contract with the state created when Poudre Valley accepted the offer in Col. Rev. Stat. Section 38-5-101 by building its facilities on the highways of the State of Colorado.

At minimum, judicially compelled loss without compensation by Poudre Valley of such contract rights constitutes a deprivation of a valuable property without due process of law.

We have read and we adopt as correct the Appellant's Statement of the Case and its statement of the Questions involved in this appeal. We have also read and fully adopt and support the Appellant's Arguments. We will hereafter supplement those Arguments with as much economy of verbiage as possible.

ARGUMENT

Proposition Number One

APPELLANT HAS NOT HAD AN ADJUDICATION OF SEVERAL FEDERAL CONSTITUTIONAL DEFENSES IT RAISED IN THIS CASE. FUNDAMENTAL FOURTEENTH AMENDMENT LAW REQUIRES THAT IT BE GRANTED ITS "DAY IN COURT."

(We simply adopt in toto the Appellant's argument, based on U.S. Const. amend. XIV, in support of this Proposition.)

Proposition Number Two

THE FEDERAL SUPREMACY CLAUSE PROHIBITS COLORADO'S DEPRIVATION OF POUDRE VALLEY'S RIGHT TO EXTEND AND FURNISH SERVICES IN THE DISPUTED AREA FROM FACILITIES FINANCED BY REA UNLESS POUDRE VALLEY OBTAINS A FRANCHISE FROM GREELEY.

The Weld County District Court made the following uncontroverted finding of fact:

> To allow the expulsion of a [sic] electric utility from portions of its certified territory by virtue of annexation of that territory by a municipality which franchises another utility would create serious problems. It would handicap the certificated electric utility in providing suitable service to its territory because

> long term planning would be difficult or impossible. Large scale investment in plant and equipment could not be jusitified [sic] if the utility were subject to expulsion at the whim of adjoining cities. *These and other similar considerations would prevent adequate service to rural territory in the vicinity of expanding cities.*

Jurisdictional Statement, at 17-18; Vol. 3 at 1029; A26. (Emphasis added by these *amici.*)

The primary purpose of the Rural Electrification Act, 7 U.S.C. Sections 901-950b (1980), is to make reliable and adequate electric service available at affordable rates. This purpose is frustrated where, as a result of loss of service areas, "the remaining portions of the electric system could not continue to operate with decent service and at decent rates." *Public Utility District No. 1 of Pend Oreille County v. United States*, 417 F.2d 200, 201 (9th Cir. 1969). In that case, a Washington State PUD attempted to acquire by condemnation a portion of the territory served by Inland Power and Light Company, a cooperative financed by REA. Even though Inland's territory was not certificated to it by a state regulatory commission and was not otherwise legally assured, and even though there was no contention of unconstitutionality or illegality otherwise of the PUD's condemnation statute, the court, invoking the Federal Supremacy Clause, restrained the PUD's taking.

The implications of Colorado's holding, portending disastrous financial consequences for the Colorado REA-financed cooperatives, presage ominous results for hundreds of electric cooperatives similarly faced with annexation by municipalities throughout the other 45 states in which they operate. This Court ought to note probable jurisdiction accordingly and remove that threat to the continued viability of the national rural electrification program.

Proposition Number Three

GREELEY'S CHARTER ARTICLE XVIII, ITS ORDINANCE NO. 26 AND THE COLORADO SUPREME COURT'S APPLICATION AND ENFORCEMENT OF THE SAME CONSTITUTE AN UNCONSTITUTIONAL IMPAIRMENT OF THE APPELLANT'S CONTRACTS.

A Colorado statute, Colo. Rev. Stat. Section 38-5-101, expressly grants to electric entities such as Poudre Valley the right to construct, maintain and operate electric lines along, across, upon, and under the public highways of the State. *See* Appendices to Jurisdictional Statement A93.

The record establishes that Poudre Valley commenced construction of its system in Weld County, Colorado, in 1940, pursuant to a permit issued in that year by the County. *See* Appendices to Jurisdictional Statement A101 and Exhibits 103, 125 and 126. The record also shows that Poudre Valley and Home Light and Power Company (now the Appellee Public Service Company of Colorado), so as to resolve a long-standing dispute as to which one could serve in various parts of Weld County, entered into an agreement in 1970 defining the boundaries of the territory which each would be certificated on an exclusive basis. The Public Utilities Commission (Commission) approved this agreement and certificated the territory here in question (as well as other territory) to Poudre Valley to serve on an exclusive basis (Exhibits 1 and 11). As noted in the Jurisdictional Statement at 8, at the time of this certification and at the time of Appellant's construction of facilities along, across, upon and under certain of the highways of Colorado pursuant to the provisions of Colo. Rev. Stat. Section 38-5-101, no part of Poudre Valley's certificated territory was within the City of Greeley.

The record also shows that in 1981 Home Light and Power Company filed an application with the PUC seek-

ing to have Poudre Valley expelled from serving the portion of Pourde Valley's certificated territory that was annexed by Greeley (which is the same territory herein involved). Appendices to Jurisdictional Statement A29. The Commission denied this application, holding:

> No showing was made in this proceeding that Poudre Valley is unwilling or unable to serve in the certificated area in question, nor was any showing made that the public convenience and necessity requires a change in utilities.
>
> A certificated area constitutes a property right which cannot be taken away except by due process of law. Colo. Rev. Stat. Section 40-5-101(2) (1973). Due process of law is met where there is substantial evidence of record to support a finding that the certificated utility is unwilling or unable to serve its certificated area, and the public convenience and necessity requires a change.

Appendices to Jurisdictional Statement A34, A37.

The Commission also held that Home Light and Power Company voluntarily surrendered its right to serve the area in question, by virtue of its 1970 agreement with Poudre Valley. *Id.* A37-38.

In addition, by reason of the opinion of the Colorado Supreme Court in *City of Englewood v. Mountain States Tel. & Tel. Co.*, 163 Colo. 400, 431 P.2d 40 (1967), it is clear that Poudre Valley didn't need to get a franchise from Greeley because it "has a franchise from the State by virtue of Colo. Rev. Stat. Section 50-5-1 (1963) (now Section 38-5-101) and the City is powerless to require a further franchise." In *Englewood* the Colorado Supreme Court also said that the telephone company—

> [*R*]*egardless of the validity of its original city franchise (a point which we need not decide), acquired what in law is a valid state franchise or right* by virtue of C.R.S. 1963, 50-5-1 and 8 (now Section 38-5-101 and 108). *This permitted it* not only to

> maintain its facilities in plaintiff's public ways, but also the right to construct and *operate additional ones therein without obtaining a city franchise.*

163 Colo. at 405, 431 P.2d at 42 (Parenthetical words and emphasis added by these *amici.*)

These *amici* regret that they are impelled to further challenge the legal basis for the Colorado Supreme Court's decision in this case, but the fact is that that court attempted to justify its holding by mistakenly embracing a number of extra-Colorado case decisions. In its opinion, reprinted in Appendices to Jurisdictional Statement A1, A17-18 that court stated:

> Our conclusion is consistent with the weight of authority from other jurisdictions that have addressed the issue . . . . the majority view is that a certificated rural electric association is permitted to continue serving the customers it had on the date of annexation, but that the association is not entitled to build or operate new facilities in the annexed area without first obtaining a municipal consent. *See Georgia Power Co. v. Altamaha Rural Elec. Membership Corp.*, 217 Ga. 376, 122 S.E.2d 250 (1961); *Missouri Public Serv. Co. v. Platte-Clay Elec Coop.*, 407 S.W.2d 883 (Mo. 1966); *Pee Dee Elec. Membership Corp. v. Carolina Power & Light Co.*, 253 N.C. 610, 117 S.E.2d 764 (1961); *Caddo Elec. Coop. v. State ex rel. Whelan*, 391 P.2d 234 (Okla. 1964); *City of Abbeville v. Aiken Elec. Coop.*, 287 S.C. 361, 338 S.E.2d 831 (1985); *State ex rel. Southern Gas and Elec. Co. v. Upshur Rural Elec. Coop.*, 156 Tex. 633, 298 S.W.2d 805 (1957); *Tri-City Elec. Ass'n v. City of Gillette*, 584 P.2d 995 (Wyo. 1978). (Two contra case citations omitted)

Four of the cases cited by the court in support of the aforequoted "conclusion" (*Altamaha*, Georgia; *Pee Dee*, North Carolina; *Caddo*, Oklahoma; and *Upshur*, Texas) turned solely on whether electric cooperatives were violating state statutory prohibitions of service to municipali-

ties in excess of stated population limits (acting *ultra vires*) or restricting REA loans for financing facilities for such service; no such legal considerations are even remotely involved here. Moreover, *in not a single one of these cases were the cooperatives regulated or holders of service area certificates of public convenience and necessity*! The other three cases (*Platte-Clay*, Missouri; *Aiken*, South Carolina; and *Tri-City*, Wyoming) turned upon statute law unique to those states.

The Colorado Supreme Court, in seeking justification from these extra-Colorado decisions, not only runs roughshod over the fundamental tenets of relevancy and this Court's holding in *Russell v. Sebastian*, 233 U.S. 195 (1914), which requires an analysis of the law of each state to determine the impairment issue; it bespeaks an almost desparate need to find *stare decisis* elsewhere in support of what, in view of *Englewood*, constitutes a gross disregard for *stare decisis* in Colorado.

We conclude with a statement that transcends—that would be, we think, appropriate with respect to—both this Proposition and Proposition Number Two on the Federal Supremacy Clause:

Poudre Valley not only has a right to serve in the contested area; it has a *legal obligation* to do so. The Appellant, like its nearly 1,000 counterparts throughout 46 of the United States, has accepted and successfully borne, to date, the costly and difficult burden of extending service throughout its service areas, most of which constitute hinterland whose human occupants are few and far between. What now the price for having so done? The predation of Greeley and Public Service Company of Colorado would not rob Poudre Valley of the paltry few consumers it now serves inside Greeley, but would attempt to rob Poudre Valley of the future consumers who predictably will locate in this contested area.

Public policy—both federal and state—surely militate against such a punitive price.

It beggars not only justice, reason and fairness, but logic itself, to essay any rational, much less constitutional, argument to support such a decimating policy. Colorado simply cannot constitutionally impair Poudre Valley's contract rights in the context of these facts.

Proposition Number Four

MINIMALLY, POUDRE VALLEY IS BEING DEPRIVED OF A VALUABLE PROPERTY RIGHT WITHOUT DUE PROCESS OF LAW.

Under Proposition Number One, we argued that failure of the Colorado Supreme Court to afford Poudre Valley its day in court on its several federal defenses constituted a violation of due process, U.S. Const. amend. XIV. We here submit simply that, without regard to that Proposition, the result of the Colorado Supreme Court's decision is to deprive Poudre Valley of its state franchise granted by Colo. Rev. Stat. Section 38-5-101, and that this is also a violation of due process.

The Proposition is amply supported by the arguments made and cases cited in support of the three preceding Propositions, and we here simply incorporate the same accordingly.

CONCLUSION

We respectfully urge and request the Court to note probable jurisdiction and to entertain the appeal on the merits. Surely substantial federal questions are involved. REA is a half-century-plus success story—to this point—of having enabled nearly 100% of America's rural people to have access to good electric service at affordable rates. Only 10% of rural Americans had electric service at REA's birth in 1936.) [6] A common sense fact, which the District Court found, is that REA-financed electric cooperative's simply cannot feasibly serve the sparsely settled areas—in the western United States generally and in Poudre Valley's case particularly, many areas have fewer than one residence per mile of line—without being able to serve the more densely settled areas. Municipal annexation almost axiomatically acquires geographic areas that either already are or quickly are becoming densely settled, not only residentially but commercially and industrially. The Colorado Supreme Court's decision is arbitrary, unjust and unfair: It imposes financial punishment upon Poudre Valley for having done a good job; it jeopardizes REA's and Tri-State's investments by eroding their security; and, as the Weld County District Court found, it inhibits proper planning and construction for future consumer needs.

To what meaningful municipal end? The Colorado Supreme Court leaves intact Poudre Valley's lines already located on Greeley's public ways and streets (and no one even suggests that Poudre Valley is not otherwise subject to the proper exercise of Greeley's basic police power). It merely proscribes service from those lines to *new* consumers. How, then, are Greeley's municipal purposes in any way served by that edict? They are not, except in support of its co-Appellee's avarice to acquire

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[6] Agricultural Credit: Electric and Telephone; Rural Electrification Act of 1936 and Related Statutory Provisions; Agricultural Law, USDA Publication 303, Chapter 98, p. 98-5.

what it did not even risk funds to develop—the exclusive right to serve new premises locating in that portion of Poudre Valley's service area that Greeley has annexed. The result, measured in terms of municipal considerations, is as absurb as the means of reaching it are arbitrary.

We pray this Court to hear the appeal and reverse or, at least, remand accordingly.

Respectfully submitted,

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